*Propper* v. *Clark*, 337 U.S. 472 ..... 6
*Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530 ..... 6
*Regents of State Univ.* v. *Rose*, 45 Mich. 284 ..... 4
*Sledge* v. *Hunt*, 157 eTnn. 606 ..... 4
*State ex rel. Loser* v. *Nat'l Optical Stores Co.*, 189 Tenn. 433 ..... 5
*Sunray Mid-Continent Oil Co:* v. *F.P.C.*, 364 U.S. 137 .... 4
*Spiegel's Estate* v. *Com'r of Internal Revenue*, 335 U.S. 701 ..... 5
*Tennessee Enamel Mfg. Co.* v. *Stoves, Inc.* (6th Cir. 1951), 192 F.2d 863 ..... 4
*The M/V "Tungus"* v. *Skovgaard*, 358 U.S. 588 ..... 5
*Township of Hillsborough* v. *Cromwell*, 326 U.S. 620 .... 6
*Welch* v. *Reiling*, 170 Tenn. 698 ..... 4

OTHERS

35 *Am.Jur.*, Master and Servant, §103 ..... 4

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

**No. 71-136**

INSURANCE COMPANY OF NORTH AMERICA,
*Petitioner,*

vs.

DR. LUIS C. PRIETO,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## STATEMENT OF THE CASE

Dr. Prieto was employed by a hospital as Director of Laboratories and Pathologist in 1956, pursuant to a contract reciting that he "is desirous of entering the employment" of the hospital, and the hospital "agrees" (Exh. 29, p.

196-7a).[1] Plaintiff tacitly admitted that the relationship was one of employment (Brief of Appellant, p. 13). Both Dr. Prieto and the hospital's chief administrative officer testified that the relationship between Prieto and the hospital remained precisely the same throughout his tenure, regardless of any subsequent contract (83a, 154a). Dr. Prieto always considered himself to be an employee (152-3a). The hospital considered him to be an employee, until the *Gault* litigation occurred (Exh. 7; 82a, 85-86a, 95a). At that stage, insurance counsel suddenly decided that a contrary view might prove financially sound (Exh. 9; 88-90a). Even thereafter, the Hospital Administrator testified under oath that Dr. Prieto was an employee (95a).

The technician-tortfeasor was considered by everybody to be the hospital's employee, even after the *Gault* incident (162-3a, 131a, 82-3a; Exh. 7). The Administrator testified at trial:

> "Q. Mr. Luton, the hospital itself, your end of it, the administration and so forth considered Mary Geiger an employee, didn't it? A. Yes Sir." (83a).

The District Court found *as facts* that both Prieto and Geiger were employees of the hospital (A7-8).[2] The Sixth Circuit concurred, as to Prieto, and found it unnecessary to inquire further (A13). The law of Tennessee is clear that an employee is not vicariously liable for a co-employee's torts.

---

1. Such page references are to the Joint Appendix below.
2. Such page references are to Petitioner's appendix.

## ARGUMENT

### I. This Court Reviews Factual Findings Only upon a Very Obvious and Exceptional Showing of Error, Not Present Here.

Petitioner seeks review of factual findings regarding employment status and negligence. The evidence touched on above provides a clear basis for the decision reached below. This Court has clearly expressed the inappropriateness of seeking review of such decisions:

> "The petitioner asks us to reject as 'clearly erroneous' the factual conclusion about his Party membership reached by the District Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' [Citation omitted.] For there was no 'very obvious and exceptional error' in the conclusion of the two courts below that Petitioner had been a member of the Communist Party. The testimony of Dr. Kury gave a concrete basis for this conclusion, and that of Dr. Halasz lent it support." *Berenyi v. District Director,* 385 U.S. 630 at p. 635.

Petitioner has shown only that the relevant evidence was, at best, conflicting. "When, as here, resolution of the disputed factual issues turns largely on the assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force." *Id.,* at p. 636.

### II. Petitioner's Constitutional Issue, Not Raised Below, Is Not Open on Certiorari.

Petitioner's Tenth Amendment claim is directed at the decision of the trial court, as affirmed by the Court

of Appeals. The claim was not presented below. This Court has repeatedly held that such a claim will not be considered. *Ellis* v. *Dixon,* 349 U.S. 458; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137; *Neely* v. *Martin K. Eby Cons. Co.,* 386 U.S. 317, *reh.den.* 386 U.S. 1027.

**III. The Decision Below Accords with the Law of Tennessee.**

The Tennessee Supreme Court has clearly held that a supervisory employee is responsible to no one for the torts of an underling. *L.&N.R.R.Co.* v. *Sessler,* 63 Tenn. 407, 408-9; *Brown & Sons Lumber Co.* v. *Sessler,* 128 Tenn. 665, 672-3. Such is the general rule. *Regents of State University* v. *Rose,* 45 Mich. 284; 35 *Am.Jur.,* Master and Servant, §103.

Tennessee law is equally clear that "the interpretation given to a contract by the parties themselves, as shown by their acts, will be adopted. [Citations omitted.]" *Tennessee Enamel Mfg. Co.* v. *Stoves, Inc.,* (6th Cir. 1951), 192 F.2d 863, at p. 868, *cert.den.,* 342 U.S. 946. *Accord: McDowell* v. *Rambo,* 21 Tenn.App. 448. Moreover, once an employment relationship is shown to exist (as it clearly did when the hospital initially employed Prieto), the burden is upon the employer to show that the relationship changed to that of independent contractor. *D. M. Rose & Co.* v. *Snyder,* 185 Tenn. 499; *National Life & Acc. Ins. Co.* v. *Morrison,* 179 Tenn. 29; *Welch* v. *Reiling,* 170 Tenn. 698; *Sledge* v. *Hunt,* 157 Tenn. 606. That burden was simply not overcome at trial.

Petitioner's argument (petition, pp. 10-12) from the Tennessee medical practice statutes is wholly unfounded. The single case cited holds that the prohibitory statutes involved apply only to persons, and *not* to corporations.

*State, ex rel. Loser* v. *Nat'l Optical Stores Co.*, 189 Tenn. 433, at p. 444. It also holds that the activities of the defendant were illegal because specifically made so by a statute applicable solely to optometry. 189 Tenn. at p. 439. Dr. Prieto was a pathologist, not an optometrist.

## IV. Lower Court Conclusions of State Law Will Not Be Overturned Unless Shown to Be Wrong.

Petitioner cites a large number of general principles, mostly of limited application to the case in general, and of none to the facts found and accepted below. The cases cited in III, *supra*, provide clear precedents for the decision below. Since Chief Judge Phillips, a Tennessean, was a member of the panel which decided the case below, the following holding of this Court is particularly apt:

> "The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals' holding was wrong. It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die, the trust corpus should revert to the donor. It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state laws." *Spiegel's Estate* v. *Com'r of Internal Revenue*, 335 U.S. 701 at p. 708.

*Accord*: *The M/V "Tungus"* v. *Skovgaard*, 358 U.S. 588, at p. 597 ("We cannot say that its conclusion is clearly wrong. Therefore, despite the inherent uncertainties in-

volved, we will not disturb that court's interpretation of the New Jersey law. Such a course is consistent with the practice that has been followed in the past.") See, also, *MacGregor* v. *State Mut. Life Assur. Co.*, 315 U.S. 280, *reh.den.* 315 U.S. 829; *Helvering* v. *Stuart*, 317 U.S. 154; *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620; *Propper* v. *Clark*, 337 U.S. 472; *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530; *Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198; *General Box Co.* v. *United States* 351 U.S. 159.

## CONCLUSION

Respondent respectfully suggests that the decisions of the District Court and of the Court of Appeals were soundly based upon Tennessee law and upon the evidence adduced at trial. The question decided is not of general importance. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

COOPER TURNER, JR., and
ROBERT M. JOHNSON
*Attorneys for Respondent*

Of Counsel:

CANADA, RUSSELL & TURNER
1213 Union Planters Bank Bldg.
Memphis, Tennessee 38103

# REPLY BRIEF OF THE PETITIONER

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP [illegible] 1971
E. ROBERT SEAVER, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-136

INSURANCE COMPANY OF NORTH AMERICA,
*Petitioner,*

vs.

DR. LUIS C. PRIETO,
*Respondent.*

## REPLY BRIEF OF PETITIONER

NEWTON P. ALLEN
1500 Commerce Title Building
Memphis, Tennessee 38103

EMMETT W. BRADEN
T. F. JACKSON, III
1500 Commerce Title Building
Memphis, Tennessee 38[illegible]
*Attorneys for Petitioner*

Of Counsel:

ARMSTRONG ALLEN BRADEN GOODMAN
McBRIDE & PREWITT

E. L. MERRIENNALE, INC., 906 Cherry Street, Kansas City, Mo. 64106, 421-3000

## INDEX


Prefatory ..... 1

Argument—

All of the Errors Petitioner Asserts Are Properly Reviewable by This Court ..... 2

(I) Petitioner's Constitutional Claim Is Timely 2

(II) This Court Has Not Hesitated to Undertake Independent Examination of Factual Issues When a Constitutional Claim Depends on Their Resolution ..... 3

(III) (a) Where a Finding of an Ultimate Fact Involves the Application of Legal Principles, It Is Subject to Review;

(b) Mixed Findings, Conclusions and Ultimate Findings Are Not Subject to the "Clearly Erroneous" Standard ..... 4

(IV) The Ultimate Findings and Conclusions That Dr. Prieto Was a Mere Employee of the Hospital Rather Than an Independent Contractor, and That the Technician Was Not the Loaned Servant of Dr. Prieto, and That Dr. Prieto Was Not Liable to the Hospital, Are Not Findings of Fact ..... 4

(V) The Decisions Below Do Not "Accord with the Tennessee Law" ..... 5

(VI) In Addition to the Nine Errors of Law Cited in the Petition, Two (2) of the District Court's Subsidiary but Pivotal Findings of Fact Were Clearly Erroneous. (These Two Pivotal Facts Related to Judge Brown's Ultimate Conclusion That Dr. Prieto Was the Hospital's Employee Rather Than an Independent Contractor.) ..... 8

(VII) The Effect of the Decisions of the Courts Below Is to Construe the 1961 Written Contract Between the Doctor and the Hospital Contrary to the *Public Policy* of Tennessee ..... 10

Conclusion ..... 11

Relief Sought ..... 12

Supplemental Appendix of Law ..... A1

## Table of Authorities

### CASES

*Baumgartner* v. *United States*, 322 U.S. 665 (1944) .... 4

*Berenyi* v. *District Director*, 385 U.S. 630 (1967) ..... 3, 4

*Bogardus* v. *Commissioner*, 302 U.S. 34 (1937) ..... 4

*Chandler* v. *United States*, 226 F.2d 403 (7 Cir. 1955) .. 4

*Conasauga River Lumber Co.* v. *Wade*, 221 F.2d 312 (6 Cir. 1955), cert. den. 350 U.S. 949 (1956) ..... 6

*Cordovan Associates* v. *Dayton Rubber Co.*, 290 F.2d 858 (6 Cir. 1961) ..... 4

*D. M. Rose & Co.* v. *Snyder*, 185 Tenn. 499, 206 SW2d 897 (Sup. Ct. 1947) ..... 6

*Dickson* v. *Blacker*, 194 Tenn. 504, 253 SW2d 728 (Sup. Ct. Tenn. 1952) ..... 7

*Ellis* v. *Dixon*, 349 U.S. 458 ..... 3

*Erie* v. *Tompkins*, 304 U.S. 64 (1938) ..... 2, 12

*Ford Motor Co.* v. *Treasury Dept.*, 323 U.S. 459 (1945) 2

*Jarratt* v. *Clinton*, 34 Tenn. App. 670, 241 SW2d 941, cert. den. Sup. Ct. Tenn. (1951) ..... 6

*Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, reh. den. 386 U.S. 1027 ..... 3

*Pullman Palace Carf Co.* v. *Gavin*, 93 Tenn. 53, 23 SW 70 (1893) ..... 7

*Roths Central Garage* v. *Holmes*, 10 Tenn. App. 500, cert. den. Sup. Ct. Tenn. (1930) ..... 7

*State ex rel. Loser* v. *Nat'l Optical Stores Co.*, 189 Tenn. 433, 255 SW2d 263 (Sup. Ct. 1949) ..... 10, 11

*Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137 ..... 3

*United States* v. *Mississippi Valley Generating Corp.*, 364 U.S. 520 (1961) ..... 4

*Weible* v. *United States*, 244 F.2d 158 (9 Cir. 1957) ..... 4

STATUTES

Tennessee Code Annotated—

Section 53-1306 ..... A1

Section 63-202 ..... A1

Section 63-203 ..... A1

Section 63-216 ..... A1

Section 63-605 ..... A2

Section 63-608 ..... A3

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

**No. 71-136**

INSURANCE COMPANY OF NORTH AMERICA,
*Petitioner,*

vs.

DR. LUIS C. PRIETO,
*Respondent.*

## REPLY BRIEF OF PETITIONER

### PREFATORY

Having previously included in its Petition the matters[1] required by Rule 23, Petitioner, Insurance Company of North America, submits its Reply Brief in response to Respondent's Brief in Opposition.

1. Except certain statutes inadvertently omitted therefrom and which are included in the Supplemental Appendix at the end of this Reply Brief.

## ARGUMENT

### All of the Errors Petitioner Asserts Are Properly Reviewable by This Court

### (I) Petitioner's Constitutional Claim Is Timely

As set out in its Petition for Certiorari (which also embodies petitioner's main brief), petitioner submits that the courts below have decided important questions of Tennessee law in a way that is in direct and irreconcilable conflict with well-established Tennessee law and public policy, and in doing so have denied petitioner rights secured by the 10th Amendment. *Erie* v. *Tompkins*, 304 U.S. 64 (1938).

Respondent has objected that the Constitutional claim comes too late because it was raised for the first time in this court.

We respectfully submit that the claim is timely.

**This Court has long-recognized that upon Petition for Writ of Certiorari questions involving basic constitutional rights may be raised for the first time in this court.** *Ford Motor Co.* v. *Treasury Dept.*, 323 U.S. 459, 467 (1945). There this court said:

> "The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."

The cases respondent cites to the contrary are not in point. Only one (*Ellis* v. *Dixon*, 349 U.S. 458) involved a constitutional issue; and there the pleadings were held to be "too amorphous to permit adjudication" and the record as "vague and empty". It was dismissed on the insufficiency of the pleadings in the state court in which it originated. It is simply inapplicable. In *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, which originated before the Federal Power Commission, the applicable statute provided that: "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. . . ." There was no constitutional issue involved. Here there is no such statute involved, and a constitutional issue is involved. In *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, reh. den. 386 U.S. 1027, petitioner raised an issue (concerning the trial court's exclusion of testimony) for the first time, in a short passage at the end of her **brief** in this Court. She did not raise it in her petition, nor was it a constitutional issue.

It should also be noted that in the instant case, all of the nine (9) grounds upon which Petitioner claims that the lower courts' decisions are contrary to the well-established Tennessee law, were raised and argued in both courts below as well as in the Petition to this Court.

**(II) This Court Has Not Hesitated to Undertake Independent Examination of Factual Issues When a Constitutional Claim Depends on Their Resolution**

Although respondent relies on *Berenyi* v. *District Director*, 385 U.S. 630 (1967), he fails to point out the long-standing policy of the Court as stated therein:

> "To be sure this Court has not hesitated to undertake independent examination of factual issues when consti-

tutional claims may depend on their resolution. . . ." (385 U.S. at p. 636, citations omitted)

**(III) (a) Where a Finding of an Ultimate Fact Involves the Application of Legal Principles, It Is Subject to Review;**

**(b) Mixed Findings, Conclusions and Ultimate Findings Are Not Subject to the "Clearly Erroneous" Standard**

The foregoing principles are set out in *Baumgartner* v. *United States*, 322 U.S. 665 (1944). *United States* v. *Mississippi Valley Generating Corp.*, 364 U.S. 520 (1961); *Bogardus* v. *Commissioner*, 302 U.S. 34 (1937); *Weible* v. *United States*, 244 F.2d 158 (9 Cir. 1957); *Chandler* v. *United States*, 226 F.2d 403 (7 Cir. 1955); *Cordovan Associates* v. *Dayton Rubber Co.*, 290 F.2d 858 (6 Cir. 1961).

**(IV) The Ultimate Findings and Conclusions That Dr. Prieto Was a Mere Employee of the Hospital Rather Than an Independent Contractor, and That the Technician Was Not the Loaned Servant of Dr. Prieto, and That Dr. Prieto Was Not Liable to the Hospital, Are Not Findings of Fact**

They are **mixed** findings of fact and conclusions of law. Those **ultimate** findings and conclusions **involved the application of legal principles** that have to do with Tennessee law concerning (a) **non-delegable contractual duty,** (b) **the public policy of the state,** (c) **the construction of written contracts,** (d) **the Tennessee loaned servant doctrine,** (e) **the right of control of a master over the manner of a servant's performance of duty,** (f) **the difference between the master-servant relationship and an independent contractor relationship,** (g) **indemnity,** and (h) **contribution.** Thus they are properly reviewable by this Court.

Moreover, **the District Judge's ultimate conclusions of law are inconsistent with his determinative findings of fact in the following three instances.**

(1) The District Judge **correctly** found that:

> *". . . Dr. Prieto had ultimate responsibility for the professional work done in the department, including the work done by Mrs. Geiger [the technician]. . . ."* (Memorandum Decision, App. A6-A7, emphasis supplied),

**yet he failed to enforce Dr. Prieto's ultimate responsibility.**

(2) He **correctly** found that:

> *It is true that, as stated, while it was not actually necessary for him [Dr. Prieto] to regularly supervise her [the technician] in such work, he had the authority to do so."* (Memorandum Decision, App. A7, emphasis supplied),

**yet he ignored the Tennessee law of master and servant and of loaned servant and failed to hold the technician to be Dr. Prieto's loan servant for whose negligence he would be responsible.**

(3) He **correctly** found that:

> *". . . the Hospital administration had no authority to control the manner in which he [Dr. Prieto] carried out strictly professional duties. . . ."* (Memorandum Decision, App. A8, emphasis supplied),

**yet he ignored the Tennessee law governing the relationship of independent contractor and held Dr. Prieto to be the mere servant of the hospital rather than an independent contractor.**

## (V) The Decisions Below Do Not "Accord with the Tennessee Law"

It is undisputed that under Tennessee law **the distinguishing mark which differentiates the relationship of**

**master and servant from that of employer and independent contractor is the right of control over the manner of performance of the work in question,** and that other factors are looked to only to aid in determining whether such right existed in a given case. *D. M. Rose & Co.* v. *Snyder,* 185 Tenn. 499, 514, 206 SW2d 897, 904 (Sup. Ct. 1947); *Conasauga River Lumber Co.* v. *Wade,* 221 F.2d 312, 315 (6 Cir. 1955), cert. den. 350 U.S. 949 (1956); *Jarratt* v. *Clinton,* 34 Tenn. App. 670, 677, 241 SW2d 941, 944, cert. den. Sup. Ct. Tenn. (1951).

**Yet both courts below ignored that principle** and held Dr. Prieto to be the mere servant of the hospital **in the face of the District Court's own finding that the hospital had no authority to control the manner in which the doctor performed his professional duties.**

**This is not a mere error of fact. Nor is it a harmless error in the court's interpretation of state law. It is a clearly erroneous, prejudicial failure to apply an undisputed principle of applicable state law to an undisputed fact.**

**The same is true of the failure of both courts below to apply the same legal principle to Dr. Prieto's relationship with his technician.**

The District Court **correctly** found that **Dr. Prieto had the authority to control her work as a cytologist.** Yet the District Court **failed to hold him the responsible master,** ignoring the Tennessee rule that: "Whenever the defendant has had such right of control, irrespective of whether he exercised it or not, he has been held to be the **responsible master.**" *D. M. Rose* v. *Snyder, supra,* at 206 SW2d 904, and *Conasauga River Lumber Co.* v. *Wade, supra,* at 315 (emphasis supplied).

It should be noted the respondent has not denied any of the foregoing. Instead he has replied that a supervisory employee is not responsible for the torts of his underling.

The answer to respondent's contention is set out in our Petition (Reason No. 1 for Granting Writ), in that (a) having bound himself contractually to the hospital to see that this test is done, and having then delegated this performance to the technician, Dr. Prieto became **absolutely responsible** to the hospital for the manner of its performance just as though he himself performed it. *Dickson* v. *Blacker,* 194 Tenn. 504, 508, 253 SW2d 728, 730 (Sup. Ct. Tenn. 1952), *Pullman Palace Car Co.* v. *Gavin,* 93 Tenn. 53, 58, 23 SW 70, 71 (1893), *Roths Central Garage* v. *Holmes,* 10 Tenn. App. 500, cert. den. Sup. Ct. Tenr (1930) and (b) the District Court itself correctly found that:

> ". . . Dr. Prieto had ultimate responsibility for the professional work done in the department, including the work done by Mrs. Geiger as a cytologist. . . ." (App. A6-A7)

**If the 6th Circuit's Per Curiam is construed as a concurrent finding of fact so as to invoke the "Two Court" rule, then the Supreme Court is bound by the foregoing, and is bound to give effect to Dr. Prieto's "ultimate responsibility" for the technician's negligence.**

If on the other hand the 6th Circuit's Per Curiam is not to be construed as a concurrent finding of fact, there is still another reason for this Court to examine independently the issues, both factual and legal.

**(VI) In Addition to the Nine Errors of Law Cited in the Petition, Two (2) of the District Court's Subsidiary but Pivotal Findings of Fact Were Clearly Erroneous. (These Two Pivotal Facts Related to Judge Brown's Ultimate Conclusion That Dr. Prieto Was the Hospital's Employee Rather Than an Independent Contractor.)**

The first was:

(1) **"The Hospital Deducted from Dr. Prieto's Compensation for Federal Income Tax. . . ."** (Memorandum Decision, App. A7)

This is clearly erroneous. **The undisputed fact is that no income tax was withheld from his compensation.** His W-2 Form for 1964 (the year of the injury) was introduced as Exhibit 2 and was also printed in the Appendix in the 6th Circuit at page 181a.[2] **His W-2 Form clearly shows that no income tax was withheld.** In addition, the testimony is that no income tax was withheld from his compensation.

The Hospital Administrator testified:

"Q. Now, let's take Dr. Prieto's compensation. Was any **Federal Income Tax** withheld from his compensation? A. **No, Sir."** (60a)[3]

This testimony occurred immediately prior to the following which may furnish a clue to the reason for the District Court's error. But for whatever reason, it clearly was error.

"Q. Now, with regard to the pension plan, state—first of all, does the hospital or did the hospital at that time have a pension plan? A. Yes, Sir.

"Q. Was Mrs. Geiger included under that or not? A. Yes, Sir.

---

2. Such citations are to the Joint Appendix below.

3. *Ibid.*

"Q. Was Dr. Prieto included under that or not? A. No, Sir.

THE COURT: What about social security? Did (18) you take social security out of Mrs. Geiger's money?

"THE WITNESS: Yes, Sir.

"THE COURT: What about Dr. Prieto?

"THE WITNESS: There was social security paid. I don't know whether it is still done on Dr. Prieto or not. But I believe this particular year there was social security deducted from Dr. Prieto, and he reimbursed the hospital for their share of it, Judge.

"THE COURT: He reimbursed the hospital for that part which the hospital contributed?

"THE WITNESS: Right.

"BY MR. ALLEN:

"Q. So it was withheld, but then he reimbursed it? A. Right. I think that was Dr. Prieto's request if I remember correctly." (p. 60a)[4]

The **second** clearly erroneous purely factual finding was:

> **(2) ". . . he [Dr. Prieto] Initially Worked under Substantially Similar Conditions Without a Written Contract."** (Memorandum Decision, A8)

To the contrary, the **undisputed proof** is that when he initially began work at this hospital in 1956 he had a written contract which expressly labeled him an "employee", and that **by his own testimony** he negotiated the 1961 contract **thereby terminating his 1956 contract,** in order **"to be more attuned to what my colleagues were doing . . . at the time they were proposing more of an independent contractor system. . . ."** (160a, 166a, emphasis supplied)[5]

---

4. *Ibid.*

5. *Ibid.*

Both contracts are exhibits and are reproduced in the Appendix in the 6th Circuit.. **A comparison of their provisions leaves no doubt that Dr. Prieto's intention and the hospital's, by his 1961 contract, was to confer on him the status of an independent contractor, de jure, in conformity with the de facto status he already enjoyed by actual practice.**

**(VII) The Effect of the Decisions of the Courts Below Is to Construe the 1961 Written Contract Between the Doctor and the Hospital Contrary to the Public Policy of Tennessee**

The only reply respondent has made to this proposition is that (a) the medical practice statutes upon which we rely apply only to persons and **not** to corporations and that (b) the statute in the *Loser* case (*State ex rel. Loser* v. *Nat'l Optical Stores Co.*, 189 Tenn. 433, 255 SW2d 263, Sup. Ct. 1949) applies only to the practice of optometry rather than medicine. Point (a) is, however, the very point we make, namely, that the Tennessee medical practice statutes governing eligibility to practice medicine limit such eligibility to individuals, as said in *Loser*, *supra*:

> "A corporation can neither practice law nor his lawyer to carry on the business of practicing law for it *any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it*. . . .
>
> "The rule is uniform that a corporation cannot practice one of the learned professions . . . and obviously this implies that a corporation cannot employ a licensed practitioner since a corporation acts only through agents. . . .
>
> ". . . the contract of employment of the doctors was illegal and against the public policy or public welfare. . . ." (189 Tenn. at 444 and 447, 225 SW2d at 268-269, citations omitted, emphasis not supplied.)

True, the statutes in *Loser, supra,* apply only to the practice of optometry, but the State Supreme Court painted with a very broad brush reviewing 19 Tennessee cases and 14 other authorities.

In view of the rules of this Court, we reproduce the medical practice statutes of Tennessee upon which we rely in a supplemental appendix under the same cover herewith. We reiterate our position that the lower courts' decisions have the effect of construing the 1961 contract (in effect on the date involved) contrary to the public policy of the State of Tennessee, and this is one of the ten reasons for granting the Petition for Writ of Certiorari as set out therein.

* * *

Since respondent has not denied our assertion that the evidence and law is that Dr. Prieto was himself negligent and that the District Court erred as a matter of law in holding that evidence of custom was necessary to make a case of his negligence, and that the Sixth Circuit erroneously pretermitted those questions, we simply reiterate our arguments made in the petition (pp. 20-21) concerning the issues as to the doctor's negligence.

Dr. Prieto, being negligent, would be responsible to the hospital for his own negligence even if he were not responsible for his technician's negligence. Thus, he would be liable for contribution, even if not liable for indemnity.

## CONCLUSION

Petitioner reiterates that the petition should be granted for one, more or all of the ten reasons originally set out therein. If the Federal Courts are at liberty to ignore, in a diversity case, controlling state law to the extent and

in the manner as in this case, the protection of the 10th Amendment, the mandate of *Erie* v. *Tompkins, supra,* and the right of petition to this Court would all, in fact, be meaningless.

Granting certiorari may be the exception rather than the rule in diversity cases, but surely this case should be the exception.

## RELIEF SOUGHT

The relief sought is:

(1) Reversal of the District Court and Court of Appeals for the Sixth Circuit, and entry of judgment against respondent for indemnity of petitioner in the same sum as rendered in the District Court against the technician, $200,743.47 plus interest at the legal rate from July 24, 1970 and all costs.

(2) Or in the alternative, the entry of judgment for contribution in the sum of 1/2 of said sum, plus interest and costs.

(3) Or in the alternative, reversal of the District Court and the Court of Appeals for the Sixth Circuit and remand to the said Court of Appeals for further proceedings in accordance with the opinion of this Court.

Respectfully Submitted,

NEWTON P. ALLEN
1500 Commerce Title Building
Memphis, Tennessee 38103

EMMETT W. BRADEN
T. F. JACKSON, III
1500 Commerce Title Building
Memphis, Tennessee 38103
*Counsel for Petitioner*